U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

B5

JAN 11 2005

FILE: WAC 03 210 53018 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Physics from Cornell University (1998). The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as

> "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that he merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at note 6.

The intrinsic merit and national scope of the petitioner's research are immediately apparent. It remains to be shown that this particular researcher, to a greater extent than others performing similar research, qualifies for a special exemption from the job offer/labor certification requirement which, by law, normally attaches to the visa classification that he has chosen to seek.

Along with documentation pertaining to his field of research, the petitioner submitted several letters of support.

Dr [redacted] Professor, Department of Physics, Colorado State University, states:

> [The petitioner] has performed sophisticated research in the area of high energy physics for a number of years . . . . Colorado State University, and Stanford University where [the petitioner] performs his research, are leading centers of research in this area.
>
> * * *
>
> [The petitioner] has produced an impressive series of achievements in the field of high energy physics over the course of his career. He has published a host of papers for which he was primarily responsible in peer-reviewed journals that are extremely competitive. His name appears on hundreds of additional

> publications. [The petitioner] has also authored a number of BaBar internal reports and CLEO internal reports.

We do not find that publication of one's work is presumptive evidence of eligibility for a national interest waiver. When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little or no evidence that other researchers have relied upon the petitioner's findings. Frequent citation by independent researchers, on the other hand, would demonstrate more widespread interest in, and reliance on, the petitioner's work. The record, however, contains no first-hand evidence showing that articles authored by the petitioner are frequently cited.

Professor [redacted] Department of Physics, Stanford University, states:

> I became familiar with [the petitioner's] skills through his experimental work at the Stanford Linear Accelerator Center (SLAC). I therefore know his research well, for he has accomplished a great deal during his time here. For instance, [the petitioner] has published several experimental and theoretical papers, facilitated and helped organize the experimental work of other researchers, and has been responsible for reviewing several additional papers before publication.

In regard to the petitioner's participation in the peer review process, it is apparent that peer review of manuscripts is a routine element of the process by which articles are selected for publication in scholarly journals or presentation at a scientific conference. Occasional participation in peer review of this kind does not adequately distinguish the petitioner from other researchers.

Professor [redacted] Department of Physics, University of Maryland, who has conducted research both at Cornell University and the SLAC, states: "I became acquainted with [the petitioner's] abilities during the execution of his experimental work at the Stanford Linear Accelerator over the last several years. [The petitioner] has demonstrated to me through his research that he possesses advanced capabilities in the area of high energy physics." We note, however, that any objective qualifications that are necessary for the performance of a research position can be articulated in an application for alien labor certification. Pursuant to *Matter of New York State Dept. of Transportation*, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training or education that could be articulated on an application for a labor certification.

Professor [redacted] Department of Physics, Israel Institute of Technology (where the petitioner received his bachelor's degree), states: "I am familiar with [the petitioner's] area of research focus . . . because I had the pleasure of collaborating with him on an important paper, recently submitted to *Physical Review Letters*. This experience alone convinces me that he is deserving of designation as an outstanding researcher."

Dr. [redacted] Research Staff Member at SLAC, states: "[The petitioner] and I are working together on QuarkNet, an education and outreach project. In short, [the petitioner's] work is advancing our understanding of phenomena in high energy physics and the dissemination of this knowledge to the general public."

Professor [redacted] Polytechnic Institute of Lisbon, Portugal, worked as a Visiting Scientist at the SLAC from September 1999 to August 2000. Dr. [redacted] notes that he "collaborated with [the petitioner] on two published articles." Dr. [redacted] states:

> [The petitioner's] research has focused on the area of high energy physics, specifically CP violation, which is a phenomenon believed to be responsible for the very existence of matter in the universe. [The petitioner's] research in this area over the years has made a contribution to the frontier of our knowledge in this field.
>
> Considering the stage of his career and the fact that he has made significant contributions to the field in both theory and experiment, which is uncommon these days, [the petitioner's] accomplishments point to his unique capabilities.

Professor [redacted] letter does not specifically identify the "contributions to the field in both theory and experiment" to which he refers.

The petitioner also submitted evidence of his receipt of a travel fellowship to attend a workshop and a graduate student award. In regard to the petitioner's graduate student award, we note that while such an award may distinguish the petitioner from other students seeking to further their education a particular university, it offers no meaningful comparison between the petitioner and experienced professionals in the research field who have long since completed their graduate studies. Because consideration for the preceding awards was limited to postdoctoral researchers and graduate students, we do not find that they are adequate to show that the petitioner's work is viewed throughout the greater physics field as nationally significant. We further note that recognition for achievement in one's field relates to the criteria for classification as an alien of exceptional ability, a classification that normally requires an approved labor certification. We cannot conclude that meeting one, two, or even the requisite three criteria for classification as an alien of exceptional ability warrants a waiver of the labor certification requirement in the national interest.

The director requested further evidence that the petitioner had met the guidelines published in *Matter of New York State Department of Transportation*. In response, the petitioner submitted additional letters of support.

Dr. [redacted] Professor of Physics, University of Texas at Dallas, states:

> I have collaborated with [the petitioner] for five years on the BaBar experiment, an international collaboration based at the SLAC.
>
> * * *
>
> [The petitioner] is a principal author for five of BaBar's papers that have been published in *Physical Review Letters/Physical Review D*, the premier national and international journals in elementary particle physics. [The petitioner] has also been entrusted with overall coordination and maintenance of the Event Generation software for BaBar.

In his second letter, Dr. [redacted] states:

> In the impressive organizations in which he has worked, [the petitioner] has yielded numerous published articles and original contributions of major significance to the discipline. His work has appeared multiple times in *Physical Review Letters* and *Physical Review D.* These journals are highly selective, and an average researcher in [the petitioner's] field could not hope to publish in them with such frequency. [The petitioner's] exceptional ability is made clear by the theoretical publications he has authored, an achievement that is highly uncommon among people in the field.

Publication, by itself, is not a strong indication of impact in one's field, because the act of publishing an article does not compel others to read it or absorb its influence. Yet publication can nevertheless provide a very persuasive and credible avenue for establishing outside reaction to the petitioner's work. If a given article in a prestigious journal (such as the *Proceedings of the National Academy of Sciences of the U.S.A.)* attracts the attention of other researchers, those researchers will cite the source article in their own published work, in much the same way that the petitioner himself has cited sources in his own articles. Numerous independent citations would provide firm evidence that other researchers have been influenced by the petitioner's work. Their citation of the petitioner's work demonstrates their familiarity with it. If, on the other hand, there are few or no citations of an alien's work, suggesting that that work has gone largely unnoticed by the larger research community, then it is reasonable to question how widely that alien's work is viewed as being noteworthy. It is also reasonable to question how much impact — and national benefit — a researcher's work would have, if that research does not influence the direction of future research. In this case, the petitioner has provided no printouts from citation indices, nor copies of articles that cite his work, to show that his publications have attracted an unusual level of attention in the field of physics.

In her second letter, Dr. [redacted] states: "[The petitioner] has produced a series of findings in the field of high energy physics over the course of his career, which have brought him national and international acclaim, and serve to distinguish him from the vast majority of researchers in his area of specialization."

Dr. [redacted] letter does not specifically identify the research findings, nor does it explain how the petitioner's work is of greater benefit than that of other researchers in the field of high-energy physics.

Dr. [redacted] Institute of Mathematical Sciences, Teramani, India, states that he first met the petitioner during a visit to the SLAC in 2002. Dr [redacted] further states: "I am familiar with [the petitioner's] work based on his many, prestigious publications in top journals in our field . . . . These articles are frequently cited by his fellow researchers, and have gained [the petitioner] a widespread reputation among leading scholars in the field."

The preceding letters of support were not supported by direct evidence showing that the petitioner's findings have measurably influenced the greater field. For example, Dr. [redacted] claim that the petitioner's articles "are frequently cited . . . and have gained [the petitioner] a widespread reputation among leading scholars" is not adequate to establish such a reputation, when the petitioner provides no evidence from citation indices to support Dr [redacted] claims. In this case, the petitioner has failed to specifically identify the published works of other researchers that cite his own findings. It is further noted that the preceding witnesses all have direct ties to the petitioner. These individuals became aware of the petitioner's work because of their collaborations with him on past projects or their involvement with the SLAC; their statements do not show, first-hand, that the petitioner's work is attracting attention on its own merits, as we might expect with research findings that are unusually significant.

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. The director noted that the record lacked evidence distinguishing the petitioner's "publications from the published work of countless others in the field." The director also noted that the majority of the letters of support appeared to be from the petitioner's former or current colleagues.

On appeal, counsel argues that "a number of experts in the field of high-energy physics have gone on record in this case with their opinion that [the petitioner] is an exceptional scientist." In accordance with the statute, exceptional ability is not by itself sufficient cause for a national interest waiver. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). Congress plainly intends the national interest waiver to be the exception rather than the rule. As has been observed in *Matter of New York State Dept. of Transportation*, a plain reading of the statute and regulations shows that aliens of exceptional ability and members of the professions holding advanced degrees are generally required to present a job offer with a labor certification at the time the petition is filed, and only for due cause is the job offer requirement to be waived. Clearly, exceptional ability in one's field of endeavor, by itself, does not compel Citizenship and Immigration Services (CIS) to grant a national interest waiver of the job offer requirement. As stated previously, the issue here is whether the petitioner's contributions in the field are of such unusual significance that he merits the special benefit of a national interest waiver, over and above the visa classification sought. In seeking the additional benefit of a national interest waiver, the petitioner in this case must provide evidence demonstrating that he has significantly influenced the field of high-energy physics.

Counsel cites the witness' letters as evidence that "[the petitioner's] work and abilities set him apart from the level of the researcher likely to surface from a labor certification petition." We find that the available evidence lacks independent support for the assertion that the petitioner's specific contributions in high-energy physics have outweighed those of other researchers in the specialty. It is not sufficient for the petitioner and his witnesses to simply describe the work undertaken by the petitioner and then to state that it has had an impact. Instead, the petitioner must demonstrate that his individual contribution has had a disproportionately greater effect as compared with the efforts of other researchers in his field. We note here that almost all of the witnesses have collaborated with petitioner on various projects in the past. This fact indicates that while the petitioner's work is valued by his professional contacts, other scientists throughout the field are largely unaware of his research and do not attribute the same level of importance to his work.

In her appellate brief, counsel discusses two new papers authored by the petitioner subsequent to the petition's filing date. A petitioner, however, must establish eligibility at the time of filing; new circumstances cannot retroactively establish eligibility as of that date. *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971).

Page 13 of the appellate brief includes a listing of several of the petitioner's published articles followed by a number indicating the number of times each of these articles has been cited. Counsel does not specifically identify the source of the information provided. Without documentary evidence (from a scientific citation index, for example) to support counsel's data, the assertions of counsel will not satisfy the petitioner's burden

of proof in this proceeding. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). CIS must base its conclusions upon objective evidence.

While the petitioner may have contributed to research projects undertaken at the SLAC, his ability to significantly impact the field beyond these projects has not been adequately demonstrated. Clearly, the petitioner's current and former collaborators have a high opinion of the petitioner and his work, as do other researchers who know the petitioner from encounters at the SLAC. The petitioner, however, has failed to demonstrate that his findings have had a measurable influence in the larger field or a nationally significant impact. We find that the documentation presented is not adequate to show that the petitioner's past accomplishments set him significantly above his peers such that a national interest waiver would be warranted. For the reasons set forth above, the available evidence does not establish that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on the national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given project or area of research, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.